
THE CORPORATION JOURNAL

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THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation, and maintenance of corporations, is to deal exclusively with members of the bar.

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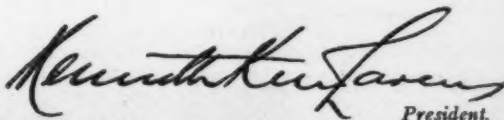
I wish every reader of THE JOURNAL would read again this legend that has appeared on each number of this magazine for many years:

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation, and maintenance of corporations, is to deal exclusively with members of the bar.

That policy is indicative, in a way, of the character of The Corporation Trust Company in all its activities.

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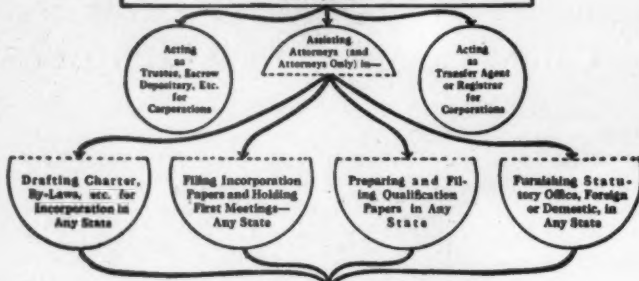
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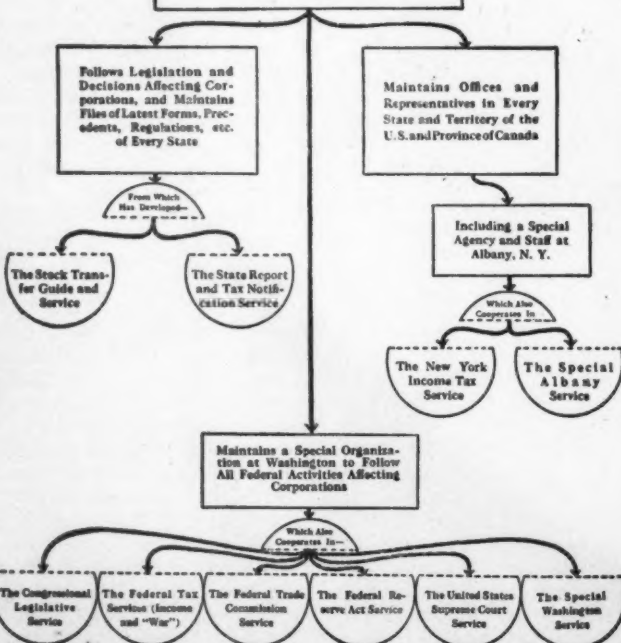
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THE CORPORATION JOURNAL

Edited by John H. Sears of the New York Bar

VOL. V, No. 113

NOVEMBER, 1922

PAGES 101-116

Taxation of Massachusetts Trusts and of So-Called Common Law Companies

In the article on the following page summarizing changes in the New York tax laws, the attention of readers in all states is particularly directed to one significant point.

Among the changes mentioned, it will be noted that New York has extended the scope of its franchise tax and of its stamp tax on the transfer of shares to a "business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificates or other written instruments."

This important step, no doubt, will greatly interest legislators in the many other states which will be in session during 1923. Not only is another source of revenue thus developed, but legislation of this class tends to remove unjust inequalities in taxation.

In this same connection it is interesting to note the attitude of the federal courts. Holding "Massachusetts trusts" subject to the Federal capital stock tax, Judge Anderson for the United States Circuit Court of Appeals, First Circuit, says: "It is a matter of common knowledge that, for most business and financial purposes, all the larger organizations of this sort have for years been indistinguishable from corporations. One might almost say that they are a device under which parties make

their own corporation code. Business concerns so organized have come to occupy a large field in industry and in finance. At least two substantial text-books have been written on the law concerning such organizations and dealing with their advantages for general business purposes. See Sears, *Trust Estates as Business Companies*, 1st Ed., 1912; 2nd Ed., 1921. * * * There is, we think, no conceivable reason why Congress should have desired to favor organizations of this questioned sort by exempting them from taxation to which their competitors in corporate form are subjected. The presumption is plainly the other way. Modern corporation laws furnish adequate machinery for carrying on every legitimate form of business, including now that of dealing in real estate. See Gen. Laws, Mass. c. 156, passim; section 7, authorizing real estate corporations. There is no present reason for resorting to this form of organization, except on the theory that more 'privileges of doing business' may be thus acquired than by conforming to our broad and elastic corporation laws. To hold that Congress intended to discriminate in their favor would be to disregard the letter, the spirit, and the reason of the acts." *Malley v. Howard*, 281 Fed. 363, Corp. Trust Co. War Tax Service, 1922, pp. 631-640.

Changes in New York Tax Laws

The New York State Tax Department has supplied the following brief summary of the provisions of Sections 181 to 204, inclusive, as amended by 1922 Legislature:

There has been no change in the provisions of Section 181 (License tax on foreign corporations) of the tax law except to include within the term "corporation," a business conducted by a trustee or trustees wherein interest or ownership is evidenced by a certificate or other written instrument.

Section 182, which relates to the "franchise tax on corporations," has been generally amended by providing as follows:

That the term "corporation" shall include any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificates or other written instruments. The law imposing stamp tax on transfer of shares has been amended in like manner. This includes common law trusts, Pennsylvania special partnerships and similar organizations.

The law now provides that every corporation taxable under Section 182 (Corporations wholly engaged in the purchase and sale of, and holding title to real estate for themselves, corporations whose sole business consists of holding the stocks of other corporations for the purpose of controlling the management and affairs of such other corporations) shall be subject to a tax of not less than ten dollars in any event, nor less than one mill on

each one dollar of such a portion of the net value of its capital stock as the amount of its assets employed in business in this state bears to its gross assets wherever employed in business. There is a limitation of the valuation for purposes of taxation which is placed at not less than five dollars per share. The former rate of three-fourths of a mill has been eliminated.

The second limitation provides that the term "net assets" shall be construed to mean not less than the difference between a corporation's assets and liabilities, and not less than the average price at which the stock sold during the year.

There is also a provision in the act whereby the dividend rate for a corporation having stock without nominal or par value shall be determined, namely, by dividing the amount distributed by the net value of the assets as of December 31st.

The taxing year no longer ends with October 31st as heretofore, but ends with December 31st annually, and for the year ending December 31, 1922, the law provides that all dividends between October 31, 1921, and January 1, 1923, shall be treated as the dividends of one year.

By the provisions of Section 192 the time for making the reports is extended from December 15th to February 15th. The tax under this act may now be paid at any time before the 15th day of March without interest.

NOTES: Minimum tax cannot be less than \$10, nor less than one mill on net values of capital stock, whichever larger. Net value cannot be less than \$5 per share, nor less than assets minus liabilities, nor less than the price evidenced by average market price of shares. If dividends of 6 per cent. or more, the tax will be at the rate of one-fourth of a mill for each 1 per cent. of dividend, unless the minimum tax would be larger. In the latter case the minimum tax is applied.

Domestic Corporations

California

Effect of Forfeiture of Charter on Powers of Corporation.

A de jure corporation whose charter has been forfeited and whose powers and functions have been suspended for failure to pay the license tax, does not continue to exist as a de facto corporation. Contracts entered into during the period of its forfeited charter and suspended powers are void. *Van Landigham v. United Tuna Packers*, 208 Pac., 973.

A Director is Disqualified from Voting if his interest in the matter under consideration, or the interest of one whom he represents, is adverse to that of the corporation. So, where a director who was attorney for one having a claim against the corporation, voted for a resolution authorizing the settlement of his client's claim by the execution of a promissory note and mortgage, the transaction was voidable at the suit of a stockholder; and the presence of the director under these circumstances cannot be used to make up a quorum. *North Confidence Mining & Development Co. v. Fitch*, 208 Pac., 328.

Colorado

Estoppel of Stockholders to Attack Validity of Mining Lease.

Stockholders must ratify a lease of the entire property of a Colorado mining corporation (Rev. Stat. 1908, sec. 865). But the provision is solely for their protection and benefit; so where the stockholders accept and keep the benefits of the lease over a period of years, during which time they know that the lessee is spending large sums in the development and operation of the mine, they are estopped to attack the validity of the lease on the ground that they had not ratified it as required by statute. *Elder et al. v. Western Mining Co.*, 280 Fed. 569.

Connecticut

Pledge of Corporate Bonds at Less Than Par. The power to issue bonds carries with it the incidental power to pledge them; and in the absence of statutory restrictions a corporation may issue or pledge its bonds on such terms as it may be able to secure, which may be less than par. *Mercer v. Steil*, 117 Atl. 689.

Delaware

Requisites of Stockholder's Petition to Intervene. A petition by a stockholder, asking leave to intervene as party defendant to set up a defense not made by the corporation, must disclose facts constituting the defense; otherwise the court has no means of knowing whether the defense, if permitted to be made, would be other than frivolous. So where the petitioner merely states that he "intends to present by answer facts" to show that the contract in suit is no longer

in force, or, "to show facts" requiring a different construction to be placed upon it, the allegations are not sufficient and the petition must be dismissed. *Atlantic Refining Co. v. Port Lobos Petroleum Corp.*, 280 Fed. 934.

Compensation of Directors. Directors have no right to compensation for services rendered within the scope of their duties, unless authorized by the charter, by-laws or stockholders of the corporation. So, where there is no such authorization, an issuance of stock is unlawful when made by the directors to themselves for services rendered in organizing the company and selling stock. It is unquestionably the duty of directors without compensation to use all reasonable efforts in organizing and selling the capital stock of the corporation they have elected to serve. *Lofland et al. v. Cahall*, 118 Atl. 1.

Georgia

Execution of a Corporate Contract in the name of a corporation by an officer who has authority to bind it, is the act of the corporation even though the person who attached the signature of the corporation did not, by adding his own name, or otherwise, indicate that he had the requisite authority. If the contract was in fact executed by one having authority, this may be shown by parol. *Oglesby Grocery Co. v. Puyallup & Sumner Fruit Growers' Canning Co.*, 113 S. E. 64.

Louisiana

Issuance of Stock for Services. The liability of a subscriber for stock in a corporation rests upon the obligation of his contract. So, where stock was issued to the defendant for services rendered, and there was no fraud, and no credit was obtained on the strength of the issue, the receiver of the corporation on its insolvency cannot compel the defendant to pay cash, even though the services were not worth the par value of the stock. *Walmsley v. Brothers*, 92 So. 766.

Maryland

Issuance of Stock for Services Not Fully Performed is valid as between the two incorporators since one of them agreed to render the services and at that time had partially performed them, and the other agreed to the valuation placed thereon. *Larkin v. MacLellan*, 118 Atl. 181.

Validity of Stock Issue not affected by failure to file certificate required by Sec. 36 of Article 23, Code P. G. L. The purpose of that certificate is to make a matter of public record the details and circumstances of an issuance of stock. It was not intended to punish the stockholder upon whom the statute imposes no duty in respect to recording or certifying the facts, by destroying the validity of his stock. *Larkin v. MacLellan*, 118 Atl. 181.

Massachusetts

Compensation of Directors. Where a director loaned the corporation money, became joint maker and guarantor of its commercial

paper, and permitted it to use his securities as collateral: held that there was no implication of a contract to pay him for his services nor was there any presumption that the assistance was rendered for reward as it was not of the character usually and commonly the subject of hire. *Sears v. Corr Mfg. Co.*, 136 N. E. 266.

Minnesota

Blue Sky Law Not Applicable to Resale of Shares Bought Outright by Broker. The Securities Law, or so-called "Blue Sky Law," according to a recent decision, does not prohibit a person who is the absolute owner of stock issued by a company which does not, either itself or through others, engage in the business within Minnesota of selling its stock or securities, from selling such stock. The seller of the stock in this case was a broker. The court, however, says: "Of course, if the issuer of securities and the ostensible purchaser are acting collusively for the purpose of evading the statute, and such purchaser sells such securities in this state, it will bring both issuer and purchaser within the operation of the statute, but that is not the situation presented in this case." *Gutterson v. Pearson et al.* (July 7, 1922, not yet officially reported.)

Payment of Excessive Salaries. If officers of a corporation fix exorbitant salaries so as to absorb earnings which should go into dividends or remain with the company as surplus, a court of equity will give relief to a minority stockholder by compelling restoration. But the dissenting stockholder has the burden of showing wrongdoing or oppression; his claim must be based on more than a mere difference of opinion upon the question whether equal services could have been procured for somewhat less. *Seitz v. Union Brass and Metal Mfg. Co.*, 189 N. W. 586.

Compulsory Distribution of Profits. The directors may not exclude a minority from participation in profits which should be distributed. If earnings are made from which dividends should be paid, and they are carried into surplus for the purpose of preventing a participation in profits, and to depress stock values, a court of equity will in a proper case require their application at the suit of a minority stockholder. *Seitz v. Union Brass and Metal Mfg. Co.*, 189 N. W. 586.

Missouri

Implied Power of Corporation to Indorse Notes. Where a corporation was the real party in interest in a transaction involving the giving of a note on which it became an indorser, it could not interpose the plea of *ultra vires*, for although its charter did not expressly give it authority to indorse paper, that power is necessarily implied when the note is in furtherance of a transaction in the line of business for which the corporation was chartered. *Pathe Exchange, Inc. v. McElroy et al.*, 243 S. W. 430.

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ice—3rd Session, 67th Congress

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*(Continued from page 107)***New York**

Liability with Respect to Transfer of Shares Standing in the Name of an Infant. The opinion digested on the front page of THE CORPORATION JOURNAL, No. 111, April-June, 1922, holding brokers and the corporation liable for loss growing out of the transfer of shares of stock standing in the name of a person not yet of legal age, is reported as *Casey v. Kastel et al.*, 195 N. Y. Supp. at page 848.

Sale of Corporate Business Without Consent of Stockholders, Void. A sale of the business of a stock corporation, under Sec. 16 of the New York Stock Corporation Law, requires the prior consent of two-thirds of the stockholders. Where without such consent the officers of two corporations agree, one to sell and the other to buy, the agreement is void and cannot be subsequently ratified by the stockholders. *Wegman v. Levinson Shoe Mfg. Co.*, 195 N. Y. Supp. 535.

By-Law Providing for Election of Treasurer By Stockholders is Invalid since it is inconsistent with section 30 of the Stock Corporation Law which provides that the directors of a stock corporation may appoint a treasurer and other officers. As the power to elect a treasurer is by statute given to the directors, the power to remove him is most likely lodged with them. The provision of the by-law being ineffective, a motion to enjoin the directors from retiring a treasurer elected thereunder must be denied. *Bechtold v. Stillwagon et al.* 119 N. Y. Misc. 177, 195 N. Y. Supp. 66.

Remedies Against Corporations for Refusal to Transfer Stock. Where a corporation wrongfully refuses to transfer its stock to a purchaser, he has the alternative of bringing a bill in equity to compel transfer or of bringing an action at law for the conversion of the stock. He can not do both. So in a suit to compel a transfer, the court rightfully declined to allow the plaintiff to amend his complaint in order that he might also claim damages for the refusal to transfer. *Jones et al. v. Osage Oil & Refining Co.*, 280 Fed. 696.

Pennsylvania

Stock Subscription Payable in Property. An original unqualified subscription to the capital stock of a corporation may be paid for in personal property, at a fair valuation, even though there be nothing in the certificate of incorporation indicating that it is to be paid otherwise than in cash. So the receiver of a corporation could not recover from holders of stock paid for in automobiles at an admittedly fair valuation, on the theory that they were liable for the stock subscriptions in cash. *Krebs v. Oberrender*, 118 Atl. 19.

South Dakota

A Corporation May Purchase Stock in Another Corporation and make payment therefor in its own stock, providing that the stock used in payment is not an original issue. Such a transaction is not in violation of Sec. 8, Art. 7, of the Constitution of South Dakota which

provides that "no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received." *Osage Oil & Refining Co. vs. Haller et al.*, 280 Fed. 693.

Texas

Increase in Number of Corporate Purposes Invalidates Stock Subscription. A subscriber who contracts for only one purpose is not bound if the charter provides for several purposes. Hence a subscription to the capital stock of a corporation which was to be organized for the purpose of building a commercial hotel is invalidated by a charter, subsequently secured, which provides for the erection of a hotel, office building, opera and play house, apartment house or steam laundry. *New Nueces Hotel Co. v. Weil Bros.*, 243 S. W. 731.

A Subscriber is Released from his obligation if the state of organization is changed, without his consent, for such a change is a material alteration of the subscription contract. *Mann v. Mitchell*, 243 S. W. 734.

Foreign Corporations

Minnesota

Incidental Transaction of National Bank Not "Doing Business." Congress has confined national banks to the conduct of a strictly banking business in the locality or place specified in its articles of organization. It can conduct no part of its general business in any other city or state. Hence the business such an institution is capable of doing outside its location is most likely limited to something that is incidental. In the present case a national bank negotiated and signed in Minnesota a contract for the interior finish and furnishing of its banking room in Montana. Held that this was an incidental transaction and not "doing business"; consequently, service on the president of the bank, who resided in Minnesota, was invalid. *Louis F. Dow Co. v. First National Bank*, 189 N. W. 653.

Texas

Erecting Billboards "Doing Business." The appellant, a foreign corporation, was engaged in the business of erecting and maintaining signs for advertising. It made a contract, in Texas, for the erection of ten such signs for the appellee in Houston. The signs were painted in Chicago and shipped into Texas. The Court of Civil Appeals said: "The contract between the appellant and appellee was an intra-state transaction and was not the subject of inter-state commerce. This follows because the lumber for the posts was bought in Houston; the signs were fixed to the posts in Houston, Tex.; the posts were set in holes dug by Houston labor, and the signs protected and repaired by Houston labor; appellant maintained in this state a corps of servants to do the work just enumerated. Those things were all of a purely local character and constituted doing business in

Texas." Hence the appellant having failed to qualify it was barred from suing for a balance due on the contract. *North American Service Co. v. A. T. Vick Co.*, 243 S. W. 549.

Utah

Accepting an Assignment of an Obligation not "Doing Business." The defendant purchased an automobile in Utah and stipulated in his contract that title was to remain in the seller until the whole purchase price should be paid. As part of the same transaction he executed a promissory note for the unpaid portion of the purchase price and made the note payable to the seller at the San Francisco office of the General Motors Acceptance Corp. The contract and note were assigned to the Acceptance Corporation, the transaction taking place in Utah. The purchaser of the automobile defaulted and the Acceptance Corporation brought suit to recover possession of the automobile. To the objection of the defendant that the corporation could not maintain the action since it was doing business in violation of the statute, the Supreme Court said: "It was not shown that respondent had any interest in the sale of the automobile in question or other automobiles in this state. * * * The mere act of accepting an assignment of an obligation against a citizen of this state is not doing business within the state within the contemplation of the law." *General Motors Acceptance Corporation v. Lund*, 208 Pac. 502.

Washington

Incidental Transactions not "Doing Business" within the meaning of Sec. 226 Rem. & Bal. Code regulating the service of process on foreign corporations. A Nevada corporation engaged in mining in Alaska owned stock in the Scandinavian-American Banks of Tacoma and Seattle, carried a general checking account in those banks, and borrowed money of them giving its note for the loan. Upon three occasions during the three years preceding the giving of the note, which is the basis of the action in this case, the company purchased in Washington certain supplies for its business in Alaska. All of these transactions, the court said, were merely incidental to the ordinary business of the company, which was mining; they were not continued dealings in the state constituting a substantial part of the general business in which the company was engaged. It was therefore not "doing business" within the meaning of the statute, and service upon an agent of the corporation temporarily in the state was invalid. *Duke v. Pioneer Mining & Ditch Co.*, 280 Fed. 883.

Taxation

Massachusetts

"Doing Business." The holding of a stockholders' meeting is an act of carrying on business. *Springdale Finishing Co. v. Commonwealth*, 136 N. E. 250.

Some Important Matters for November, December and January

This calendar does not purport to cover general taxes or reports to other than state officials, nor those we have been officially advised are not required to be filed. *The State Report and Tax Service maintained by The Corporation Trust Company System* sends timely notice to attorneys for subscribing corporations of report and tax matters requiring attention from time to time, furnishing information regarding forms, practices and rulings.

ALASKA—Annual Applications for Licenses on certain occupations due on or before January 15. Domestic and Foreign corporations and persons.

Annual Corporation Tax due on or before January 1—Domestic and Foreign Corporations.

ALABAMA—Annual Fee for Permit to do Business, due January 1—Foreign Corporations.

CALIFORNIA—Annual License Tax due between January 1 and first Monday of February—Domestic and Foreign Corporations.

Capital Stock Affidavit due between January 1st and first Monday of February—Foreign Corporations.

COLORADO—Annual Report due within 60 days after January 1—Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January—Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report due between January 1 and January 20—Domestic Corporations.

GEORGIA—Annual Franchise Tax due on or before January 1—Domestic and Foreign Corporations.

INDIANA—Annual Report due during January—Foreign Corporations.

KANSAS—Annual Report and Franchise Tax due between January 1 and March 31—Domestic and Foreign Corporations.

KENTUCKY—Annual Report due on or before February 1—Domestic and Foreign Corporations.

LOUISIANA—Capital Stock Statement and Tax due on or before December 31—Foreign Corporations qualified on and after August, 5, 1922.

MARYLAND—Annual Report due between January 1 and March 15—Domestic and Foreign Corporations.

MASSACHUSETTS—Annual Report of information for income tax due between January 1 and March 1—Domestic and Foreign Corporations.

MICHIGAN—Annual List of Stockholders due during January or February—Domestic and Foreign Corporations.

MISSOURI—Annual Return of Net Income due between January 1 and March 1—Domestic and Foreign Corporations.

NEW MEXICO—Annual Franchise Tax due on or before November 30—Domestic and Foreign Corporations.

NEW YORK—Annual Report due during January—Domestic and Foreign Corporations.

Capital Stock Reports due between January 1 and February 15—Domestic and Foreign business corporations other than those subject to so-called income tax.

Annual Franchise Tax on Income of Business Corporations due on or before January 1—Domestic and Foreign Business Corporations other than realty and holding companies.

NORTH CAROLINA—Annual Franchise Fee due on or before first day of December or any time after October 15—Foreign Corporations.

OHIO—Report to Department of Industrial Relations due during January—Domestic and Foreign Corporations.

PENNSYLVANIA—Capital Stock Report and Corporate Loan Report due between January 1 and February 28—Domestic and Foreign Corporations.

Bonus Report due between January 1 and February 28—Foreign corporations.

SOUTH CAROLINA—Annual Statement due during January—Foreign Corporations.

UNITED STATES—Fourth Installment of Income and Excess Profits Taxes imposed for the calendar year 1921, due on or before December 15.

UTAH—Corporation License Tax due between November 15 and December 15—Domestic and Foreign Corporations.

WISCONSIN—Income Tax due on or before January 31—Domestic and Foreign Corporations.

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- 2—**Shares Without Par Value.** This pamphlet contains what we believe to be the only published synopses of the 25 non-par value laws in force at the present time.
- 3—**Reorganizations, Mergers, Consolidations.** Gives provisions of the Federal Revenue Act of 1921 bearing on the determination of gain or loss, and the computation of stamp taxes, in reorganizations, mergers and consolidations. Revised to April 13, 1922.
- 4—**Business Corporations Under the Laws of Delaware.** Gives advantages under the law; statutory requirements and forms; includes a description of shares without par value. The General Corporation Laws of Delaware are published in a separate pamphlet which may also be had on request.
- 5—**Extracts From the Statutes of the Various States Relating to the Admission of Foreign Corporations.** Separate for each state. They show the documents to be filed, fees and taxes to be paid, and the statutory penalties for failure to comply, in the state covered. Sent only to counsel interested in the qualification of a definite corporation in a particular state or group of states. Please indicate the states desired.
- 6—**New York Non-Par Value Law, as Amended.** Includes important changes by the 1921 Legislature.
- 7—**Revenue Act of 1921.** Contains full text of the Federal Act approved by the President, November 23, 1921.
- 8—**Talks on Foreign Corporations.** A series of articles appearing originally in The Corporation Journal.
- 9—**Safeguarding Stock Transfers.** A new pamphlet dealing with the many pitfalls in transferring stock on a corporation's books, and the liability of a company's officers for making unauthorized transfers.

The Corporation Journal

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No matter in what state or territory of the United States or province of Canada you may wish to incorporate a company for a client—

No matter in what state or territory of the United States or province of Canada you may wish to qualify a client company to do business as a foreign corporation—

The Corporation Trust Company will render you just the assistance for that state or territory or province that you need. It can supply forms, precedents and outlines for any jurisdiction, can supply information on which to make a choice of the jurisdiction best adapted to your client's needs, and can attend to all the details for you in whatever jurisdiction you choose.

THE CORPORATION TRUST COMPANY

37 Wall Street, New York

Affiliated with

The Corporation Trust Company System

15 Exchange Place, Jersey City

Chicago, 112 W. Adams Street
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Portland, Me., 281 St. John St.

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